Supreme Court of the United States

OCTOBER TERM, 1954

No. 69

JOE VALDEZ GONZALES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

SUBJECT INDEX

Cases Cited

Cases Cited *continued*

Statutes Cited

SELECTIVE SERVICE MATERIAL CITED

MISCELLANEOUS CITATIONS

MISCELLANEOUS CITATIONS *continued*

Supreme Court of the United States

OCTOBER TERM, 1954

No. 69

JOE VALDEZ GONZALES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported. (*Gonzales* v. *United States*, 6th Cir., April 15, 1954, 212 F. 2d 71) It appears in the record. [R. 98] A memorandum opinion of the district court also appears in the record. [R. 81-92] This opinion is also reported.—*United States* v. *Gonzales*, 120 F. Supp. 730.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1954. [R. 97] The petition for writ of certiorari was filed within 30 days of the date of such judgment. The jurisdiction of this Court was invoked under 28 U. S. C. § 1254(1). (See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.) This Court granted the writ of certiorari on October 14, 1954. [R. 100]

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) provides:

"*Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the Presi-

dent, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period presribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of

this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Section 12(a) of the act (50 U. S. C. App. § 462(a)) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . . "

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) provides:

"*Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find

that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in paragraph (a) (2) or (4) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."—E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, as amended by E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) provides:

"*Decision of appeal board.* (a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *Provided,* That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

I.

Whether the denial of the claim for classification of petitioner as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Whether petitioner's willingness to defend himself and his Christian brothers by the use of force in event of attack is basis in fact for a denial by the appeal board of the conscientious objector classification claimed by petitioner.

III.

Whether a sincere and bona fide member of a religious group having religious objections to performance of military service may be denied his conscientious objector status under the act and the regulations for the reason that he is a recent convert and his conscientious objections are not old enough because they were acquired shortly before his registration under the draft law.

IV.

Whether the act and the regulations permit the draft boards or the courts to deny the conscientious objector status because the objector to direct participation in the armed forces is willing to work in a defense plant that might be held to be indirect participation in the war effort.

V.

Whether the fact that some members of Jehovah's Witnesses may choose to enter the armed forces and have done so may be considered as a basis in fact for the denial of the conscientious objector status to petitioner, notwithstanding that he sincerely believes in the tenets of Jehovah's Witnesses against direct participation in the armed forces, to such an extent that he cannot participate in the armed forces.

VI.

Whether petitioner was denied his rights to procedural due process of law contrary to the act and the Fifth Amendment to the Constitution when the appeal board considered and acted upon the adverse recommendation

against petitioner without first giving petitioner an opportunity to answer the recommendation.

STATEMENT OF THE CASE

Petitioner was indicted and charged in the district court with violation of the Universal Military Training and Service Act by refusing to submit to induction. [R. 2]

On May 14, 1953, petitioner was arraigned. He pleaded not guilty. [R. 1] He waived the right of trial by jury on July 7, 1953, the date his trial began in the district court. The trial continued to the next day. The court heard evidence. At the conclusion of the evidence a motion for judgment of acquittal was filed. The court took the case under advisement and reserved decision on July 13, 1953. On September 22, 1953, the trial court filed a memorandum opinion denying the motion for judgment of acquittal and finding petitioner guilty. [R. 1] The opinion is printed in the record. [R. 81-92] On October 26, 1953, the trial court sentenced petitioner to the custody of the Attorney General for a period of three years and ordered him to pay a fine of $500.00. [R. 1, 93]

A notice of appeal was timely filed. [R. 94] Motion for bail was denied by the trial court. [R. 94] Application for bail pending appeal was made to the Court of Appeals and allowed by it. The record was duly filed and case was fully argued, briefed and submitted to the Court of Appeals. [R. 97] On April 15, 1954, the Court of Appeals entered its judgment of affirmance. The opinion of the Court of Appeals is in the record. [R. 97-99] The clerk of the Court of Appeals has filed in this Court a certified copy of the printed transcript of the record. R. [1-99]

Petitioner was born July 22, 1931, at San Antonio, Texas. [R. 35] He registered with Local Board No. 95, Wayne County, Michigan, at Detroit, on January 4, 1950. [R. 34]

A classification questionnaire was mailed to him on February 28, 1951. [R. 34] He answered the questionnaire and returned it to the board on March 9, 1951. [R. 35]

He gave his name and address. [R. 36] In Series VI he stated he was a minister of religion and that he regularly and customarily served as such. He stated that he had been a minister of Jehovah's Witnesses since February 19, 1950. He stated that he had been formally ordained on February 19, 1950. [R. 37]

In Series VII he stated that he was married and lived with his wife and that they had been married at San Antonio on September 27, 1948. [R. 27] He showed that he was employed by the Great Lakes Steel Corporation and devoted forty hours per week to this work. [R. 37-38]

In Series X he said he had completed eight years of elementary education and two years of high school, but had not graduated from high school and that he had received private instruction and Bible training by H. Graffis from November 19, 1949, to October 1, 1950. [R. 38]

He signed Series XIV showing that he was conscientiously opposed to participation in war and desired to be furnished the special form for conscientious objector. [R. 39]

On page seven of the questionnaire, under "Registrant's Statement Regarding Classification," he requested the local board to classify him as a regular or ordained minister of religion. [R. 39]

In response to the request contained in Series XIV of the questionnaire certifying that he was a conscientious objector, on March 27, 1951, the local board mailed to him the special form for conscientious objector. [R. 40] He answered the questions therein and on April 2, 1951, returned it to the local board, after having signed series I(B) showing he was opposed to both combatant and noncombatant military service. [R. 42-47]

In the special form he answered that he believed in the Supreme Being. [R. 43] He said that his duties to the

Supreme Being were superior to any duties he owed as a result of any human relationship. He said he believed his obligations to the Creator were higher than those owed to the state. He relied on the Ten Commandments and the Bible. He believed in the love of God and the love of neighbor. He added that anything that caused him to violate any of God's commandments he could not do. [R. 43] He stated that he had learned his conscientious objections as a result of intensive Bible study. [R. 43-44]

He stated that P. C. Truscott was the presiding minister of the congregation that he customarily attended. He relied entirely on the knowledge of the Bible for the basis of his belief. [R. 46]

He gave references of persons who could corroborate his stand as one of Jehovah's Witnesses and who could certify that he was a consientious objector. He then signed the form. [R. 47]

The local board considered the questionnaire and the special form and on April 10, 1951, classified him in III-A as a married man. [R. 40] This classification made it unnecessary for the board to consider his claim for exemption as a minister. It signified, however, that the board had bypassed his conscientious objector form. [R. 40] On April 25, 1951, the local board notified petitioner of the classification. [R. 40]

On May 7, 1951, Gonzales filed a request for a personal appearance to discuss his classification. On May 15, 1951, the board decided not to grant the personal appearance but rather to send his file to the appeal board, according to a notation in the margin of the letter requesting the appearance. On May 16, 1951, the local board forwarded the file of Gonzales to the appeal board on its own motion. [R. 49-50] The appeal board affirmed the III-A classification on June 12, 1951. [R. 40, 50] Notice of this was sent to him on June 15, 1951. [R. 40]

He remained in the classification of a married man until January 8, 1952. On that date he was placed in Class I-A

by the local board and so notified. [R. 40] On January 16, 1952, petitioner requested a personal appearance. [R. 50] The local board set January 29, 1952, for the hearing. [R. 40, 51] This was first postponed to February 4, 1952, and then adjourned, because of a lack of a quorum, to February 12, 1952. [R. 40, 51]

On February 12, 1952, a personal appearance was conducted. A stenographer was present and made a transcript of the hearing. [R. 40, 52-60] The memorandum of the personal appearance showed that Gonzales was ordained in February, 1950. [R. 51] He testified that he became a full-time pioneer minister on October 1, 1950. He said: "I give 100 hours per month or about 1200 hours per year to ministerial activity." [R. 51, 53]

He pointed out that working 40 hours per week did not interfere with the performance of his ministerial duties and that the reason he did not quit Great Lakes Steel Corporation was that it did not interfere with the performance of his full-time pioneer ministry. [R. 53]

He stated he based his conscientious objections upon the teachings of the Bible that "we should not kill and should love our neighbors as ourselves." [R. 54] He said he did not have a certificate of ordination but that his ministry was proved by the hours he worked and the knowledge he had of the Bible. He said he was the advertising servant for the Downtown Unit of Jehovah's Witnesses in Detroit. He then added that he had a regular parish or personally assigned territory where he preached. [R. 55-56] He showed he had a congregation and place of meeting and that he preached in various places in the homes of the people as well as in the hall where the ministry school is conducted. [R. 55-56]

He stated he was employed at the Great Lakes Steel Corporation on the midnight shift because he had put his "minister's duties first" and that if he could not put them first he would have to get another job. He said the Great Lakes Steel Corporation "worked it out for me." [R. 56]

He informed the members of the local board that he had attended a regular Theocratic Ministry School where he prepared himself for the ministry. He stated that it is not a school of theology, but rather a school where the Bible is taught. He referred to the textbook *Theocratic Aid to Kingdom Publishers*. [R. 56-57]

He answered that the Great Lakes Steel Corporation manufactured some articles that are used in war. He said that did not have any bearing on his belief any more than did his paying an income tax. He said he would not assist a person injured in battle. When asked why he helped the war effort by working in a defense plant he stated he had to make his living some way. Even if he raised pigs, he said, he would be doing the same thing when he paid his income tax. He said he did not know where the money went and that it was not his business. He said by working and paying income taxes he was rendering to Caesar the things that were Caesar's. [R. 56-58]

He was asked if he would be willing to fight for Caesar. He said he would not give his life to Caesar, because it did not belong to Caesar; it belonged to God who gave it. He could obey only those laws of man that are not against God's commands. The judge of what belongs to God and what to Caesar was God's Word, the Bible; he would determine what he should do by using the Word of God. [R. 58]

He asked permission to call before the board the presiding minister of his congregation, Paul Truscott, to verify his testimony that he was a pioneer full-time minister. The board assured him that since he had made these statements under oath, "we do not doubt it." [R. 59]

The local board made no decision on February 12. It did so at a later date and on February 19, 1952, it classified petitioner in I-A. [R. 40]

On February 19, 1952, the local board ordered him to report for armed forces physical examination on February 28. [R. 40, 60-61] On February 20, Gonzales appealed

to the appeal board. The appeal was filed on February 25. [R. 40, 61] On February 28 he appeared for the examination and on April 8 he was mailed a certificate of acceptability. [R. 41, 61-62] His file was forwarded to the appeal board on April 8, 1952. [R. 40] On April 14, 1952, the State Director of Selective Service transmitted the file to the appeal board. [R. 62-64]

On June 6, 1952, the appeal board, having determined that petitioner should not be classified in I-O or in a class lower than I-O, forwarded the file to the United States Attorney, under the provisions of Section 1626.25, for advisory recommendation by the Department of Justice. [R. 41, 64-66]

After the file was forwarded to the Department of Justice an extensive FBI investigation was conducted. [R. 66-68] This was followed by a reference of the file to a hearing officer of the Department of Justice. The hearing officer notified petitioner to appear before him on August 5, 1952, for a hearing on the sincerity of his conscientious objections. [R. 11-12]

The hearing officer, John C. Ray, was called as a witness and testified in behalf of the Government in the trial court. [R. 10-20] He identified the report of the hearing made by him and mailed to the Department of Justice. [R. 11-12] The hearing officer's report was read into the record. [R. 11-16]

The FBI report showed that petitioner was "well regarded in the several communities in which he has lived and that he and his wife are said to be very religious." [R. 13-14] They held Bible studies in their home and devoted considerable time to religious work. The investigation of the FBI disclosed that he was "a devoted member of the sect and applies himself earnestly to his religious work" [R. 12-14]; that he served as advertising servant and supervisor of the distribution of the religious magazines for the congregation with which he was associated; and that from February, 1950, to September, 1950, he "worked at least

twenty hours each month doing public preaching, distributing literature, conducting Bible studies and making 'back calls' [on] interested persons." [R. 14] The report showed that Gonzales thereafter became a pioneer or full-time minister of Jehovah's Witnesses. [R. 14] As such he was required to put in a minimum of one hundred hours monthly in preaching. [R. 14]

The hearing officer found: "[Gonzales] appeared to be a sincere Jehovah's Witness and as such is conscientiously opposed to war. He refuses combatant and noncombatant service and claims classification as an ordained minister by virtue of his baptism in the Jehovah's Witnesses sect in February, 1950. As is customary with Jehovah's Witnesses, registrant claimed that his regular bread-earning work was merely an avocation and that his ministry was his true vocation. Besides his claim of being a minister, registrant also alternatively claimed to be a conscientious objector. He disclaimed being a pacifist and under certain circumstances, if attacked, he would defend himself and members of his family to the point of taking life." [R. 15]

The hearing officer concluded (although Gonzales was a full-time minister): "his affiliation with the sect has been too recent to warrant acceptance thereof as a deep-seated conviction. Until the fall of 1949 he was a Catholic and his conversion to the Jehovah's Witnesses is too closely related to his selective service status to be accepted yet as genuine." [R. 15] The hearing officer recommended against both the ministerial and conscientious objector classifications. He suggested the I-A classification. [R. 15-16] On August 11, 1952, his report was mailed to T. Oscar Smith, Special Assistant to the Attorney General, Washington, D. C. [R. 16]

The hearing officer testified at the trial. [R. 10-20] He said that Gonzales gave the usual grounds given by others of Jehovah's Witnesses as basis for his claim as a conscientious objector, making the usual Bible quotations [R. 16]; that Gonzales had applied himself to his belief [R. 17]; and that he got the impression that Gonzales was

a sincere Jehovah's Witness. [R. 18-19] He based his denial of the conscientious objector claim to Gonzales solely on the fact that petitioner's "conversion to the Jehovah's Witnesses is too closely related to his selective service status," since petitioner had been a Catholic until the fall of 1949. [R. 13, 15, 19-20]

When asked whether a person "could not be a conscientious objector today because he was not yesterday" the hearing officer refused to answer. [R. 19-20] He again said on cross-examination that the only basis for the adverse recommendation was the time element. [R. 20]

The report of the hearing officer to the Attorney General does not appear in the file. [R. 20-21]

The local board clerk testified that only the recommendation from the Department of Justice (a letter from the Assistant to the Attorney General) appeared in the file. The recommendation of the Attorney General merely referred to the report. [R. 21] The clerk testified about the recommendation of the Attorney General. It was read into evidence. [R. 21]

The recommendation of the Attorney General referred to the fact that Gonzales was "a sincere Jehovah's Witness" but concluded that his affiliation "with that sect has been too recent and too closely related to his draft status to warrant the acceptance of his conscientious objector position as genuine." [R. 67-68] The Attorney General stated that Gonzales became a member of Jehovah's Witnesses in February 1950, one month after his registration in January 1950. He said that this was despite "the fact that his wife had been a member for many years," and that it "lends weight to this conclusion." [R. 68]

The recommendation of the Attorney General to the appeal board is dated December 1, 1952. It appears in the draft board file. [R. 66-68] No notice of filing it was given to petitioner. The appeal board acted upon the recommendation without giving Gonzales an opportunity to answer the report and classified him in I-A on December 11, 1952.

[R. 41, 69] This made him liable for military training and service and denied his claim for exemption as a minister or classification as a conscientious objector. He was notified of this classification on December 15, 1952. [R. 41]

On December 21, 1952, Gonzales wrote to the state director, requesting a review of his case. [R. 69] On January 6, 1953, the local board transmitted his file to the state director upon request of that official. [R. 70-71] On January 13, 1953, the state director informed Gonzales and the local board that no action would be taken and no further review was permitted. [R. 71-72]

On February 3, 1953, petitioner was ordered to report for induction on February 19. [R. 41, 73] He reported on February 19, 1953, but refused to submit to induction. [R. 41, 77-78] He was reported to the United States Attorney as a delinquent. [R. 41, 76] He was indicted for refusing to submit to induction. [R. 2]

Question I (*supra*, page 7, this brief) was raised in the trial court under ground 4 of the motion for judgment of acquittal. [R. 78-79] The trial court recognized this contention. [R. 83] It found that there was basis in fact for the denial of the conscientious objector status. [R. 83-85] One basis for the denial of the conscientious objector claim, the trial court declared, was the fact that Gonzales was a late convert of Jehovah's Witnesses. [R. 83-84] The trial court also found as basis in fact for the denial of the full conscientious objector status that Gonzales was engaged in work in a defense plant engaged in the manufacture of some articles of war. [R. 84] The finding that Gonzales was a late-comer as one of Jehovah's Witnesses is made the basis of point III (*supra*, page 8, this brief). The reliance upon the employment in a defense plant as basis in fact for the denial of the conscientious objector status is made the basis of question IV (*supra*, page 8, this brief).

The trial court also found that because some of Jeho-

vah's Witnesses had joined the army, and Gonzales stated it was up to each one to determine whether he was consientiously opposed to service in the armed forces, this was basis in fact. [R. 84] This is made the basis of question V (*supra,* page 8, this brief).

Petitioner also complained of the making of the recommendation by the Department of Justice against his conscientious objector claim without giving him an opportunity to defend himself against the unfavorable recommendation before the appeal board acted upon it. This was raised in ground 11 of the motion for judgment of acquittal. [R. 80] The trial court held that failure to include the adverse recommendation in the file did not constitute a violation of procedural due process of law. [R. 87]

The Court of Appeals stated that the judgment of the trial court was affirmed "for the reasons set forth by Judge Koscinski in his order denying judgment of acquittal." [R. 99] In the per curiam opinion of the Court of Appeals some of the facts are stated. [R. 98] The court below held that that part of the recommendation of the Department of Justice (that Gonzales be denied the conscientious objector status because he was a late-comer to Jehovah's Witnesses) was not illegal. [R. 98-99] The court relied upon the statement made by Gonzales that others of Jehovah's Witnesses had joined the army and that conscientious objection was an individual choice for each to make. [R. 98] The court found that the Department of Justice recognized Gonzales to be sincere and conscientiously opposed to war, but that he stated that if attacked he " 'would defend himself and members of his family to the point of taking life.' " [R. 98]

The court below relied upon the oral testimony of the hearing officer that, while Gonzales was sincere, because of his late conversion there were "other factors" the court based the opinion upon. [R. 99] In one sentence the court states that claiming conscientious objection "shortly before being subject to the draft law" has no connection with

the claim for classification "as a conscientious objector." [R. 99] Yet the court, without explanation, says it bears upon whether Gonzales was "sincere" in making the claim. [R. 99] The court held that the recommendation of the Department of Justice was "merely advisory." [R. 99]

The court below found that failure to give Gonzales notice of the adverse recommendation by the Department of Justice and classifying him without an opportunity to defend himself against the recommendation were not a denial of procedural due process of law. [R. 99]

SUMMARY OF ARGUMENT

ONE

There was no basis in fact for the denial of the conscientious objector status by the appeal board to petitioner; consequently, the final I-A classification is arbitrary and capricious.

Section 6(j) of the Universal Military Training and Service Act (62 Stat. 604, 612; 65 Stat. 75, 86, 50 U. S. C. App. § 456(j)) is altogether different from the Selective Service Act of 1917 (40 Stat. 76, 78, 50 U. S. C. App. § 201). In the 1940 act (Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 887, 50 U. S. C. App. § 305 (g)) the Congress eliminated the requirement of pacifistic belief. Under present law all that is required is an individual belief in the Supreme Being. It is not necessary to be a member of any church. All that is required is religious training and belief. (*United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128, 130-131) The change in the 1948 act eliminated political and philosophical beliefs.—See Senate Report 1268, 80th Cong., 2d Sess., May 12, 1948, accompanying Senate Bill 2655.

The law does not permit comparisons between religious beliefs of consientious objectors. In determining whether petitioner is a conscientious objector the judicial inquiry is limited to (1) belief in a Supreme Being, (2) belief in obligations higher than those owed to the state, (3) oppo-

sition to combatant and noncombatant service, and (4) no political beliefs.

The historic fair treatment of conscientious objectors in the United States runs back to colonial times. This history was relied upon by Congress in reaching a liberal definition of conscientious objector.—*Girouard* v. *United States*, 328 U. S. 61, 68-69 (1946).

The undisputed documentary evidence showed that Gonzales had sincere conscientious objections against combatant and noncombatant military service, based on his belief in a Supreme Being involving duties higher than those arising from any human relation. No question of his sincerity is involved. There is no dispute as to the facts appearing in the file. The draft boards did not question his sincerity. The boards merely demurred to his evidence rather than denied it. Nowhere in the file did Gonzales agree to do military service. He at all times opposed it.

The absence of contradictory evidence permits petitioner to invoke *Dickinson* v. *United States*, 346 U. S. 389, 396-397 (1953).—See *Weaver* v. *United States*, 8th Cir., 1954, 210 F. 2d 815, 822-823; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439, 441; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 368, 369, 371.

Neither petitioner's willingness to defend himself nor his employment in a civilian defense plant constitutes basis in fact for the denial of the conscientious objector status. —*Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 692; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 899-900; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d — ; *United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443, 445, 446.

The mere fact that Jehovah's Witnesses permit each individual to make his own determination as to the dictates

of his conscience does not give basis in fact for the denial of the conscientious objector status. While Jehovah's Witnesses have no publications against war there are innumerable statements of belief in respect to the neutrality of Jehovah's Witnesses and their nonparticipation in military service.

There was no exercise by the hearing officer of his right to question the credibility of Gonzales. The fact that there was a hearing in the Department of Justice does not *per se* give rise to the conclusion that the hearing officer disbelieved Gonzales. A speculation that he did not think Gonzales was credible must be rejected for the lack of a memorandum in the file specifically showing such fact.—*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 690-691; *Dickinson* v. *United States,* 346 U. S. 389, 396, 399 (1953).

The late change from Catholicism to the belief of Jehovah's Witnesses preceded the registration by Gonzales. The law contemplated a late change of religions, to allow conscientious objectors to make their claims even though they are late converts. Gonzales filed his conscientious objector claim in time. This was before he was first classified. Even if he had filed the conscientious objector claim after he had been classified, this would not be untimely. The law contemplates a change of status even after registration and classification.—*Dickinson* v. *United States,* 346 U. S. 389, 392-393, 395 (1953); *Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633, 635; *United States* v. *Packer,* 2d Cir., 1952, 200 F. 2d 540, 541, reversed on other grounds, 346 U. S. 1 (1953); *United States* v. *Clark,* W. D. Pa., 1952, 105 F. Supp. 613, 614; *United States* v. *Vincelli,* 2d Cir., 1954, 215 F. 2d 210, 212-213.

Permission by law to file a conscientious objector form late after a conversion to religious opposition to service prohibits the court below from finding basis in fact for the denial of the conscientious objector status because Gonza-

les quit the Catholic Church and became one of Jehovah's Witnesses shortly before his registration.

TWO

The hearing officer of the Department of Justice arbitrarily and capriciously recommended against petitioner's claim by rejecting the undisputed evidence that showed he was a conscientious objector to both combatant and noncombatant military service, on the ground that he became one of Jehovah's Witnesses and a conscientious objector too recently and that therefore he was not in good faith a conscientious objector.

The recommendation of the Department of Justice was illegal. The hearing officer found Gonzales to be sincere and an active member of Jehovah's Witnesses, believing in opposition to both combatant and noncombatant military service. The Department of Justice recommended that because Gonzales quit the Catholic Church when he married his wife in 1948 and later became one of Jehovah's Witnesses in 1949 (before he registered) such was basis in fact for the denial of the conscientious objector status. This recommendation was illegal because the change of religions does not *per se* mean that Gonzales was insincere. Gonzales became one of Jehovah's Witnesses and began preaching in December, 1949; he was ordained in February, 1950, and entered the full-time ministry of Jehovah's Witnesses in October of 1950. He was a conscientious objector before January, 1950, the date of his registration. He was a full-time minister before he filed his questionnaire on March 9, 1951.

The recommendation of the Department of Justice was contrary to the regulations of the Selective Service System authorizing a change in status. It was in defiance of the principle announced in *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633, 635; and *Dickinson* v. *United States*, 346 U. S. 389, 392-393, 395 (1953).

The recommendation of the Department of Justice misinterpreted the facts. It stated that Gonzales became one of Jehovah's Witnesses after he registered in January, 1950. This recommendation defied the record showing that Gonzales began preaching in December of 1949. This was one month before he registered under the law. He was not baptized until one month after he registered. He was active and fully dedicated to serving as a full-time minister of Jehovah's Witnesses long before he filed his classification questionnaire in March of 1951. The recommendation of the Department of Justice is not in accordance with the facts. The switch of Gonzales from Catholicism to the religion of Jehovah's Witnesses after the law was passed was not illegal. It was not basis in fact. The law permits even the late filing of the conscientious objector claim and reopening of the case after the original classification. (*United States* v. *Vincelli,* 2d Cir., 1954, 215 F. 2d 210, 212-213) If a conscientious objector claim can be filed after classification, then there is no basis in fact in the late conversion of Gonzales, which was before he registered for the draft.

Not one word can be found in the act or the regulations that indicates that the privilege of conscientious objection was confined to long-time conscientious objectors before the passage of the act. The conscientious objector status is like any other claim. It can be made before a board at any time. The recommendation of the Department of Justice (that the late conversion of Gonzales to the beliefs of Jehovah's Witnesses was *per se* evidence of bad faith) is illegal, arbitrary and capricious.

Freedom of religion guarantees freedom to change religions. Congress did not intend to deny this freedom to persons converted to beliefs in conscientious objection. All religions are constantly proselytizing the millions of nonchurch members and members of other religions. The change of religions is going on constantly in time of peace as well as in time of war. This well-known practice was not

intended by Congress to be basis in fact for the denial of the rights of the convert.

The recommendation of the hearing officer, that Gonzales' failure to show a religious belief of long standing was basis in fact for the denial of the conscientious objector status, is speculative, irrelevant and immaterial. (*Dickinson* v. *United States,* 346 U. S. 389, 396-397 (1953); *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802-803, 805; compare *White* v. *United States,* 9th Cir., Sept. 14, 1954, — F. 2d —) The recommendation ignores the facts. Gonzales married one of Jehovah's Witnesses in 1948. He quit the Catholic church one year before he registered. He was proselytized by his wife and finally became active one month before he registered. He was a full-time duly ordained minister one year before he filed his Selective Service questionnaire. He therefore stood on the same basis as a matter of fact and law as would a person born into Jehovah's Witnesses. His late activity as one of Jehovah's Witnesses was no basis in fact for the denial of the conscientious objector status. Without a finding that Gonzales was a hypocrite it was illegal, arbitrary and capricious for the Department of Justice to recommend that the conscientious objector status be denied.—*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 805; compare *White* v. *United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.

The recommendation of the Department of Justice discriminates between a new convert and an old believer in a religious belief with conscientious objections to military service. The law did not intend to discriminate between newcomers and old-timers in a religion.

The scope of review in draft cases is limited. (*Estep* v. *United States,* 327 U. S. 114 (1946)) This commands strict compliance with the procedural requirements of the act. (*National Labor Relations Board* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446) The Department of Jus-

tice and the appeal board were required to comply strictly with the act and were not permitted to speculate outside the law. (*United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90, 92) It is true that the recommendation of the Department of Justice is advisory. It was, however, considered and apparently adopted by the appeal board. That board denied the conscientious objector claim. It classified Gonzales in Class I-A as recommended. The chain of administrative proceedings took on, therefore, a broken link. The cracked link in the chain was the report and recommendation of the Department of Justice, embraced by the appeal board. When a recommendation is made it is presumably followed. (*Clementino* v. *United States*, 9th Cir., Sept. 27, 1954, — F. 2d — ; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d —) Reliance upon the recommendation of the Department of Justice invalidated the appeal board's classification, which became part of the administrative proceedings.—*United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128, 131; *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 397-398; compare *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 330-331; *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 691.

THREE

The Department of Justice deprived Gonzales of his procedural rights to due process of law by not mailing a copy of the report of the hearing officer and its proposed recommendation to the appeal board to petitioner before the recommendation was mailed to the appeal board and by not giving him an opportunity to rebut the adverse recommendation before the final appeal board classification, contrary to due process of law.

The Department of Justice recommendation is made pursuant to Section 1626.25 of the regulations. The classification of the appeal board is made in accordance with Section 1626.26. The Department makes the recommenda-

tion and the appeal board acts upon it without giving notice to the registrant of the unfavorable nature of the recommendation. There is nothing in the act or regulations that forbids the giving of notice. Section 1(c) of the act requires that the classification be arrived at by fair and just methods.

It has uniformly been held that a local board classification based upon reports and information of which the registrant has no notice is illegal. Failure by the local board to give notice of the unfavorable evidence received by it and acted upon is a denial of due process of law. —*Brewer* v. *United States,* 1954, 211 F. 2d 864, 866; *Sheats* v. *United States,* 10th Cir., 1954, 215 F. 2d 746; *DeGraw* v. *Toon,* 2d Cir., 1945, 151 F. 2d 778, 779; *United States* v. *Balogh,* 2d Cir., 1946, 157 F. 2d 939, 943-944, vacated 329 U. S. 692 (1947) and affirmed, 2d Cir., 1947, 160 F. 2d 999.

In *Morgan* v. *United States,* 304 U. S. 1, 19, this Court held that a person before an administrative tribunal is entitled to have given to him what the Government proposes to recommend to the administrative agency. This Court held that failure to give a party an opportunity to answer the proposed adverse recommendation to the Government without notice is a violation of procedural due process of law. The identical procedure there condemned was employed by the Department of Justice in this case. Since a local board cannot act upon any information or a recommendation received by it without giving the defendant notice, then by force of the same reason the appeal board, which stands in the same shoes as does the local board, may not receive adverse recommendations against the registrant and act upon them without notice. The action of the appeal board and the Department of Justice in this case was a flagrant violation of due process of law. It was a star-chamber procedure prohibited by the fair and just provisions of Section 1(c) of the act and the Fifth Amendment of the United States Constitution.

ARGUMENT

ONE

There was no basis in fact for the denial of the conscientious objector status by the appeal board to petitioner; consequently, the final I-A classification is arbitrary and capricious.

Section 6(j) of the Universal Military Training and Service Act, *supra*, page 2 (62 Stat. 604, 612, 65 Stat. 75, 86, 50 U. S. C. App. § 456(j)) is altogether different from the Selective Service Act of 1917 (40 Stat. 76, 78, 50 U. S. C. App. § 201). Section 4 of that act limited the conscientious objector status to members " . . . of any well recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations. . . ." This provision above quoted was similar to that appearing in Section 17 of the Act of February 24, 1864 (13 Stat. 6, 9).

Section 5(g) of the Selective Training and Service Act of 1940 omitted completely the requirement of pacifism or membership in a "peace church." The 1940 act provided that a conscientious objector, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," was exempt from participation in combatant training and service.—Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 887, 50 U. S. C. App. § 305 (g).

For a detailed statement of the legislative hearings and the history of the development of the 1940 law relating to conscientious objection, see Sibley and Jacob, *Conscription of Conscience*, Cornell University Press, Ithaca, New York, 1952, pp. 45-52. There is an interesting discussion of the 1917 and the 1940 conscientious objector provisions appearing in an article written by Marcus entitled "Some Aspects of Military Service," 30 Mich. L. Rev. (1941) 913, 943-946.

The present law is different from the 1917 act, which limited the protection to the pacifist religions. Both the discussions in Congress and the reports on the 1940 act show that Congress changed the law for conscientious objectors. It let the exemption stand on an individual basis, so long as the person based his objections on belief in the Supreme Being.

Under this present law the objections need not be pacifistic. They are sufficient when based on the Bible. Neither the 1948 act nor the 1951 act made reference to pacifism. Neither act fixed the religious standard of any certain religion as the yardstick. The conscientious objection provision extends even to members of churches whose principles do not oppose war. It is an individual objection.—*United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 130-131.

The only change that the 1948 act made was to prevent the nonreligious political, philosophical and sociological objectors from claiming the exemption.

Senate Report 1268, 80th Cong., 2d Sess., May 12, 1948, accompanying Senate Bill 2655, provided as follows:

> "(j) *Conscientious objectors.*—This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States* v. *Berman,* 156 F. (2d) 377, certiorari denied, 329 U. S. 795.) Elaborate provision is made for determining claims to exemption on this ground and provision is made for the assignment of persons who object to both combatant and noncombatant military service to work of national importance under the immediate direction of a civilian. The exemption is viewed as a privilege."

Under the law, whether the path of the objector is through the Bible or through the writings of the Shintoists, Moslems or Buddhists, he is entitled to his exemption. The 1948 and 1951 acts protect him. The law does not prescribe any fixed religious path through any of the writings. It did not to avoid invading religious freedom in violation of the First Amendment. To do so would make the draft boards and the courts a religious hierarchy to determine what is orthodox in conscientious objection. That Congress did not intend.

The Government cannot compare Gonzales' beliefs with the pacifistic beliefs of other religions and thus determine whether the beliefs fit the statute. To do this, as suggested by the Government in the courts below, also will convert the Court into a heresy tribunal. To reject religious beliefs on conscientious objection by comparison of Jehovah's Witnesses' beliefs with other religious beliefs is in violation of the "fair and just" provisions of the act and the First Amendment to the Constitution.

All the Court can inquire about is confined to what the act says. The act says that one is a conscientious objector entitled to the benefits of the law if he shows that (1) he believes in the Supreme Being, (2) his belief imposes obligations higher than those owed to the state, (3) he opposes both combatant and noncombatant military service, and (4) his beliefs are not political, sociological or philosophical but are based on belief in God.

A strict construction of the act was not intended by Congress. It had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. Congress knew that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and

meaning ever since. (Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950) So strongly was the principle of conscientious objection imbeded in American principles that President Lincoln and his secretary of war thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

As it appears above, the Selective Service System, in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.*, pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.*, page 37) From the Revolutionary War to the Civil War provision for exemption of conscientious objectors appears in the state constitutions.

The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States*, 328 U. S 61, 68-69. In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in view. It intended to preserve the freedom of religion and conscience in regard to conscientious objection and it provided a law whereby such freedom could be preserved.

The documentary evidence submitted by the petitioner establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service that were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." [R. 37, 39, 41-42, 43-49, 51-60, 69-70] This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely per-

sonal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the petitioner. The local board and the appeal board accepted his testimony. The local board, the Department of Justice and the appeal board all failed to raise any question as to his veracity. [R. 51-52, 66-68] They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that petitioner is a conscientious objector, opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing petitioner's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: was the holding by the appeal board (that the undisputed evidence did not prove petitioner was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that petitioner was willing to do military service. All his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the petitioner suggest or even imply that he was willing to perform any military service. He at all times contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

Congress did not intend to confer upon the draft boards arbitrary and capricious powers in the exercise of their

discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the petitioner is a conscientious objector, entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 8th Cir., 126 F. 2d 242, 247; *Dickinson* v. *United States,* 346 U. S. 389, 396-397 (1953).

The undisputed documentary evidence in the file before the appeal board showed that the petitioner was conscientiously opposed to participation in combatant and noncombatant military service. This showing brought him squarely within the statute and the regulations providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

It has been held by many courts of appeals that the rule laid down by this Court in *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399 (1953), holding that if there is no contradiction of the documentary evidence showing exemption as a minister there is no basis in fact for the classification, also applies in cases involving claims for classification as conscientious objectors.—*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369, 371; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772;

Schuman v. *United States*, 9th Cir., 1953, 208 F. 2d 801, 804-805; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439, 441; *United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443, 445, 446; *contra United States* v. *Simmons*, 7th Cir., 1954, 213 F. 2d 901, 903.

In *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 900, after quoting from *Dickinson* v. *United States*, 346 U. S. 389 (1953), the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the above holdings. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government, which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact for the denial of the conscientious objector status. For instance, see *Jessen* (10th Cir., 1954, 212 F. 2d 897, 899), where the Tenth Circuit (after following *Taffs* v. *United States*, 8th Cir., 1953, certiorari denied 347 U. S. 928 (1954)), said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States*, 10th Cir., 1952, 205 F. 2d 689, 692; *United States* v. *Pekarski*, 2d Cir., 1953, 207 F. 2d 930, 931; *Taffs*

v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331-332, certiorari denied 347 U. S. 928 (1954); *Jewell* v. *United States*, 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States*, 9th Cir., 1953, 208 F. 2d 801, 804-805; *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 368-369, 370-371; *Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93, 96-97; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 899-900; *United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439, 441; *United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443, 445, 446. And these cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of these cases discussed the speculation urged on the courts as basis in fact the cases are different. They are not different, because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference.

That petitioner believed in a position of strict neutrality and had no objection to defending himself, his ministry and his brothers does not prove that he was not a conscientious objector. It was error, therefore, to conclude that this religious belief deprived the petitioner of the right to claim that there was no basis in fact for the denial of the conscientious objector status by the appeal board. The argument that belief in self-defense deprives one of the right to claim classification as a conscientious objector has been rejected in many cases. (*Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 691-692; *United States* v. *Pekarski*, 2d Cir., 1953, 207 F. 2d 930, 931; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331; *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 370-371; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 899; see also *United States* v. *Hagaman*, 3rd Cir., 1954, 213 F. 2d 86, 89; *United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439, 442; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d —; *United*

States v. *Sage*, D. Nebr., 1954, 118 F. Supp. 33, 36; *United States* v. *Bortlik*, M. D. Pa., 1954, 122 F. Supp. 225, 227) This is discussed at greater length in the brief in the companion case, *Sicurella* v. *United States*, No. 250, October Term, 1954, at pp. 44-55.

There is no basis in fact for the classification in this case, because there are no facts that contradict the documentary proof submitted by the petitioner. The facts established in his case show that he is a conscientious objector to both combatant and noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that petitioner is sincere in his objections. He is opposed to any form of participation by himself in war. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or to go in as a consientious objector to actual combat service only. He objects to doing anything in the armed forces. He will not be a soldier.

It is said by the courts below that because Gonzales stated that some of Jehovah's Witnesses have gone into the army, therefore not one of Jehovah's Witnesses is entitled to be classified as a conscientious objector. This position taken by the courts is an effort to deny to Jehovah's Witnesses, as a group, classification as conscientious objectors and thereby include the petitioner in such group and cause him to be denied the conscientious objector classification to which he is entitled. This type of judicial process and argument was condemned by the court below in *Niznik* v. *United States*, 6th Cir., 1950, 184 F. 2d 972, 974. In *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633, 637-638 it was held that each registrant is entitled to be classified according to the facts of his own case. The courts below also say that because each one of Jehovah's Witnesses must decide for

himself whether he wants to make the claim as a conscientious objector this constitutes a basis in fact for the denial of the claim when made by the petitioner. The mere fact that Jehovah's Witnesses permit each one to make a decision for himself and a group determination is not made for each member does not in any way deprive each one of his legal rights under the law. The courts have held that every member of a religious organization that does not have tenets against participation in war (unlike Jehovah's Witnesses) is nevertheless entitled to be classified as a conscientious objector and he may not have his claim denied him because his church does not take such stand.—See *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 130-131.

In the court below the Government placed some emphasis upon the fact that Gonzales stated that Jehovah's Witnesses have no official statement as to their views on war. This statement does not authorize the court to hold that Jehovah's Witnesses or Gonzales are not entitled to the conscientious objector status. The argument made by the Government should not, therefore, be accepted here. While the record shows that Jehovah's Witnesses are not pacifists, the Court can take judicial notice that Jehovah's Witnesses have published articles showing their stand of neutrality. These publications contain official statements by Jehovah's Witnesses against their participation in combatant and noncombatant military service. These articles do not take an open, bold and defiant stand against war as the extreme pacifists take. They are not war resisters' publications. They merely state the conscientious objections of Jehovah's Witnesses. These publications have been referred to in *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331, and *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 370-371. The fact, therefore, that Gonzales stated that there were no official views of the organization on the subject of conscientious objection to war does not mean that there are not publications on the neutrality of Jeho-

vah's Witnesses.—See the brief for petitioner in the companion case, *Witmer* v. *United States*, No. 164, October Term, 1954, pp. 28-32.

It was held by the courts below that the willingness of Gonzales to do civilian work in a steel plant constitutes an implied consent on his part to do noncombatant military service. The unreasonableness of this position taken by the courts below is clearly demonstrated by the terms of the act itself. The act provides for civilian work outside the army that may contribute to the national welfare. Should this civilian work be considered equivalent to a consent in private to do noncombatant military service in the armed forces, then it was useless for the Congress to provide for the exemption from such noncombatant army service for persons willing to do alternate civilian work that contributes to the national welfare.

The Court should notice that the appeal board classified Gonzales to make him liable for combatant service, not noncombatant service. Yet the Government below argued that he is willing to do noncombatant service, because of the fact that he works in a steel plant that has defense orders. The argument by the courts below falls on its face. It becomes mere dust to be quickly blown away with one breadth of truth and reason.

Since Congress stated the difference between civilian work and noncombatant military service, then how can the Government argue that there is no difference? Congress has stated the difference. This statement by Congress of the difference does not justify the Government now to argue that because a man is willing to do some work that might have a connection with the defense effort it is equivalent to agreeing to do military service. There cannot be such a connotation placed on the fact in this case. (See *United States* v. *Wilson*, 7th Cir., 1954, 215 F 2d 443, 446; *Goetz* v. *United States*, 9th Cir., Oct. 14, 1954, — F. 2d — ; *Franks* v. *United States*, 9th Cir., Oct. 4, 1954, — F. 2d —.) This point is discussed more extensively in the brief for

petitioner in No. 164, October Term 1954, *Witmer* v. *United States*, a companion case to this one, at pp. 40-49 of that brief.

The courts below take the position that the conscientious objector status of petitioner is a question of fact. It is stated that it involved the weighing of the evidence when the board classified the petitioner. It is said that it was for the draft board alone to determine whether petitioner is a conscientious objector and that it is not for the court to say whether in this case there is no basis in fact.

This contention of the respondent would be true if the respondent could point to any part of the record where the statements of petitioner are contradicted or impeached, but there is no place in the record where Gonzales was questioned in his testimony and doubted. Nowhere was anything stated by Gonzales that was disputed. The Government must accept, therefore, what Gonzales said to be true, because it can find no controverting evidence in the file. There was no weighing of the evidence, therefore, to stay the hand of the court, because there was no dispute in the record made before the draft board.—*Dickinson* v. *United States*, 346 U. S. 389, 396-397, 399 (1953); *Jewell* v. *United States*, 6th Cir., 1953, 208 F. 2d 770, 771.

The courts below rely upon the report of the hearing officer and the recommendation of the Department of Justice to the appeal board, but there are no contradictory facts appearing in either of these documents. Nowhere in either of them are any facts turned up that in any way dispute the accuracy of the statements made by Gonzales. The documents merely accept what Gonzales says to be true. Both the hearing officer and the Assistant Attorney General, in order to reach a conclusion that Gonzales was not entitled to a conscientious objector status, indulged in speculation. This was done without any factual basis for the conclusion reached.

Since the boards are precluded from indulging in speculation as a basis in fact for the denial of a claim, then

by force of the same reason the recommendations of the Department of Justice, based on speculation or conjecture, are not basis in fact for the denial of the conscientious objector status, even when accepted and relied upon by the appeal board.—*Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 691; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331; *cf. United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128.

The respondent argued below that the hearing officer had the right to observe the demeanor of petitioner. This may be true as a matter of law. It is not true as a matter of fact. The hearing officer found Gonzales to be a sincere member of Jehovah's Witnesses. Nowhere does he state or even infer that Gonzales was shifty or that his conduct as a witness indicated that he was not believable. Even in a judicial proceeding the jury or the judge (if it is a trial without a jury) may observe witnesses and judge their credibility. The mere fact that the jury or judge has this right does not mean that every witness that appears before the court has been found to be unbelievable. In reviewing the administrative proceedings it is beyond the competency of the courts to speculate about the right of an administrative agent to observe the demeanor of the registrant. This argument was accepted in the case of *Dickinson* v. *United States*, 9th Cir., 1953, 203 F. 2d 336, by the Court of Appeals for the Ninth Circuit, but it was rejected by this Court.—346 U. S. 389, 396-397 (1953).

Unless and until the administrative records show that there was an exercise of the right to observe the demeanor and that the demeanor of a registrant was found to establish a lack of credibility it cannot be speculated or assumed that the credibility of the registrant was questioned. (See *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691.) The argument of respondent, therefore, on this point is irrelevant and immaterial.

It is said by the courts below that, because Gonzales did not show any interest in Jehovah's Witnesses until after

he married and did not become ordained until after the time of his registration, this may be considered as basis in fact. Emphasis is placed upon his having been reared as a Catholic and his continuing to be a member of the Catholic church until the time of his registration.

The late change from Catholicism to the belief of Jehovah's Witnesses is no basis in fact whatever. This type of argument is rejected by the Court of Appeals for the Ninth Circuit. In *Schuman* v. *United States,* 1953, 208 F. 2d 801, the registrant did not show he was a conscientious objector until long after he filed his questionnaire. This was much later than when petitioner made this fact known, which was in the questionnaire. In that case Chief Judge Denman cited the sudden conversion of the apostle Paul as proof that a recent convert can be as sincere as one who is reared in the faith.—See the opinion, 208 F. 2d at pp. 802, 804-805. Compare *White* v. *United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.

The act and the regulations contemplate and permit a change in status after registration and after classification. The act makes mandatory that a registrant inform the local board of any facts that would affect his present status or that would change his classification. (See Section 1625.1 of the Selective Service Regulations.) The fact that these changes are provided for in the regulations rejects the argument that a revelation of the change in such circumstance of being a new convert after registration is basis in fact for the denial of the classification. The argument of the respondent nullifies the spirit of the regulations. It completely cuts the reason out from the regulation above cited providing for a revelation of a change in status after registration. The position of respondent runs counter to *Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633, 635.

The courts have held that the late filing of the special form for conscientious objector, even after classification, requires a reopening. It is necessary to allow the reopening to provide for the appeal. An administrative interpre-

tation has been put upon this by the Selective Service System.—See *United States* v. *Packer*, 2d Cir., 1952, 200 F. 2d 540, 541, reversed on other grounds, 346 U. S. 1 (1953); *United States* v. *Clark*, W. D. Pa., 1952, 105 F. Supp. 613, 614; *United States* v. *Vincelli*, 2d Cir., 1954, 215 F. 2d 210, 212-213.

Since the regulations allow the late filing of the conscientious objector form to require a reopening of the classification, then what authority do the courts below have for the holding made, that the conversion of Gonzales at about the time of his registration is basis in fact for the denial of the conscientious objector claim? The holding repeals the act and waters down completely the strength of the regulations authorizing a reopening of the classification. It makes void the statutory right of appeal guaranteed by Section 6(j) of the act. This is argued at greater length under point Two of this brief, *infra*, pp. 41-51. It is submitted that there was no basis in fact whatever for the denial of the conscientious objector status and that the final I-A classification is arbitrary and capricious.

TWO

The hearing officer of the Department of Justice arbitrarily and capriciously recommended against petitioner's claim by rejecting the undisputed evidence that showed he was a conscientious objector to both combatant and noncombatant military service, on the ground that he became one of Jehovah's Witnesses and a conscientious objector too recently and that, therefore, he was not in good faith a conscientious objector.

The report and recommendation from both the hearing officer of the Department of Justice and the Attorney General showed that Gonzales was a sincere and active member of Jehovah's Witnesses. [R. 12-16, 66-68] They agreed that he did not falsify in any of his statements appearing in his conscientious objector form. They held that, except for his affiliation with Jehovah's Witnesses shortly prior to

his registration, his conscientious objector claim was bona fide. [R. 12-16, 66-68]

The undisputed evidence in this case showed that Gonzales was a Catholic at the time he married his wife, who was one of Jehovah's Witnesses in 1948. The evidence showed that she encouraged him to quit the Catholic church and take up the faith of Jehovah's Witnesses. This he did gradually. He studied and became an active minister in the organization. In February, 1950, he dedicated himself formally. However, he began preaching as a minister before that date in December, 1949. In October, 1950, after being a part-time minister for nearly a year, he took up the full-time ministry as a pioneer of Jehovah's Witnesses. He registered with the local board on January 4, 1950. At this time he had been a bona fide worker and active minister for a month or more before he registered. He filed his classification questionnaire with the local board on March 9, 1951. At that time he had been active as a minister of Jehovah's Witnesses for more than a year.

It was the duty and responsibility of the Selective Service System to classify and the Department of Justice to recommend on Gonzales according to his status at the time he filed the questionnaire and not according to his former status before he became one of Jehovah's Witnesses.—*Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633, 635; *Dickinson* v. *United States,* 346 U. S. 389, 392-393, 395 (1953).

The effect of the recommendation of the hearing officer was to make it appear that petitioner did not start preaching or become interested in the work of Jehovah's Witnesses until after he registered. He registered in January, 1950. [R. 34] The record showed activity by Gonzales as an unordained or regular minister of religion before the date of his registration. The record shows that he began preaching in December, 1949. [R. 44, 46] However, the record shows that he was ordained in February of 1950. [R. 53] Gonzales had conscientious objections, therefore, before he reg-

istered and before he was ordained. He was convinced of the beliefs of Jehovah's Witnesses sufficiently to be preaching them as a regular or unordained minister before he registered. The report of the hearing officer did not take these vital and significant facts into account when it was made to the Department of Justice and by the Assistant Attorney General adopted and transmitted to the appeal board. To be fair and just as required by the act it was important that the hearing officer at least give the right interpretation of the true facts, which were that Gonzales had been active as one of Jehovah's Witnesses before he registered and had conscientious objections before he registered. A false impression was therefore conveyed by the hearing officer in his report. This report, when adopted by the Department of Justice in its recommendation to the appeal board (which relied on the report and recommendation), deprived Gonzales of a substantial right. It was not a fair and just report that could be expected from a fair and impartial hearing officer, as required by the act and the regulations.

Late conversion of Gonzales before registration is no worse than making a claim after the filing of the questionnaire and the classification of a registrant. In such case the board is obliged to reopen the classification. See to the contrary *United States* v. *Vincelli*, 2d Cir., 1954, 215 F. 2d 210, 212-213. This argument ignores the provisions of Section 6(j) of the act. That law allows an appeal from any denial of the conscientious objector claim when made, regardless of the time of making the claim. (50 U. S. C. App. § 456(j), 56 Stat. 83, *supra*, p. 2) Now that Congress has provided for the right of an appeal from the denial of the claim without regard to when the claim is made, to accept the argument of the respondent that the late conversion of Gonzales is basis in fact is also equivalent to saying that a local board is not required to reopen the classification. That would merely mean to deny completely the right of an appeal guaranteed by the statute.—*United States* v.

Clark, W. D. Pa., 1952, 105 F. Supp. 613, 614; *United States v. Vincelli*, 2d Cir., 1954, 215 F. 2d 210, 212-213.

Neither the act nor the regulations mention the fact that a late-comer cannot be a conscientious objector. The act did not confine its privileges to conscientious objectors who were conscientious objectors before the act was passed or before hostilities began. The act deals with conscientious objection as it does any other claim for exemption that may arise after the passage of the act after registration and after classification. That status is to be determined according to the facts existing at the time of the final classification of the registrant.

The hearing officer relied upon arbitrary and capricious grounds for denial of petitioner's claim as a conscientious objector. He said that petitioner was formerly a Catholic but quit the Catholic church. This has no relevancy whatever to the claim for classification as a conscientious objector based on the beliefs of Jehovah's Witnesses. The mere fact that petitioner recently came to a knowledge of God's Word as taught by Jehovah's Witnesses is of no consequence. The undisputed evidence showed that he was one of Jehovah's Witnesses and a conscientious objector at the time he filed his questionnaire and at the time of his final classification by the local board on the occasion of his personal appearance. There was no dispute of such contention. There was nothing whatever to dispute in any way the evidence filed by petitioner showing that he was a conscientious objector.

It is a part of the basic fabric of the nation that the people have freedom of religion guaranteed by the First Amendment of the United States Constitution. This constitutional guarantee not only gives freedom of worship in the religion of one's choice but also secures the right to change to another religion. This freedom to shift churches or views is inherent. Congress certainly intended to protect the full freedom. The hearing officer was unauthorized by

Congress and prohibited by the Constitution to penalize petitioner because he changed his religion.

No one questioned the good faith of petitioner in becoming one of Jehovah's Witnesses. His good faith in becoming one of Jehovah's Witnesses is not disputed in the evidence. There is absolutely no evidence whatever that he fictitiously or fraudulently assumed the robe of conscientious objection believed by Jehovah's Witnesses, for the purpose of evading military service. The conscientious objector form, the affidavits of the witnesses and the evidence given before the hearing officer completely corroborated his bona fide beliefs as one of Jehovah's Witnesses.

It is arbitrary and capricious for the hearing officer to reject all the undisputed evidence purely because petitioner was a late-comer to Jehovah's Witnesses. Religions of all denominations are constantly acquiring new converts and losing old worshipers. There is a constant turnover of membership among the various religions. This is going on in time of war as well as in time of peace. Since the practice is not criticized and the change of religions is not evidence of bad faith in time of peace, then by force of the same reason a change of religions from a nonpacifist group to a religion believing in conscientious objection is not proof of evasion. This change cannot be held to be *per se* fraudulent or in bad faith.

Proselyting is going on all the time. The New York *Times* (Thursday, March 25, 1954) carried an account of a change in religions during the last ten years. It showed that 4,114,366 Roman Catholics have become Protestants and 1,071,897 Protestants have become Catholics during the last decade. There must be something expresed in the act that would compel an interpretation of bad faith as claimed by the Government. The spirit of the act and the history of freedom of religion in this country compels a different construction, especially in the case of conscientious objectors.

The hearing officer's report failed to show that Gonzales was not a sincere and active member of Jehovah's Witnesses. Nowhere in the report of the hearing officer does it appear that Gonzales falsified any of his statements appearing in his conscientious objector form. The hearing officer merely determined that because Gonzales recently took his stand as one of Jehovah's Witnesses he was not entitled to the conscientious objector status.

These findings by the hearing officer are not findings of fact. They are speculative, irrelevant and immaterial. (See *Dickinson* v. *United States,* 346 U. S. 389, 396-397 (1953); *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802-803, 805; compare *White* v. *United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.) It is apparent, therefore, that the conclusion reached by the hearing officer, that Gonzales was not a conscientious objector, because of the reason of a late change of religion, specified by him, made the report and recommendation illegal, arbitrary and capricious.

The change of religious belief by Gonzales was natural. There was nothing in the change that would indicate any suspicions. The fact that the petitioner entered into the full-time ministry certainly ought to prove his sincerity. Cannot the injustice of the Government's position be shown in this? One of Jehovah's Witnesses born into a family of witnesses may rock along and be a part-time minister. Yet he still may be held to be a sincere conscientious objector. On the other hand and at the same time, a man who evidences his sincerity by extreme sacrifice, by holding a full-time secular job at night and becoming a full-time minister during the day, is held to be insincere. This purely because he was a recent convert. Recent conversion is not something positive. It is not something direct. This is not affirmative evidence in the file. There must be something affirmative, more than mere proof of being a late-comer, that disputes the statements appearing in the file and in papers signed and filed by Gonzales.

The hearing officer's reports and the Department of Justice reports should be scrutinized for facts, not speculations. If it appears that there is nothing affirmatively denying the statements of the registrant, and the recommendation is based on the fact that Gonzales' religious training and belief were not deep-seated, this standing alone is not a contradiction of the proof of sincerity. The recommendation is based largely, if not exclusively, on the proposition that Gonzales has not been long and deeply trained in religion.

One fallacious defense of the report of the hearing officer was made by respondent in the court below. It was that he exercised his right of judging the credibility of the petitioner. The hearing officer did not undertake to say that he disbelieved what Gonzales said. [R. 12-16] At the hearing he made no challenge of the credibility of the petitioner. It cannot be speculated that he disbelieved Gonzales. (*Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691) A draft board or a hearing officer has the right to challenge the believability of a registrant but if he does so he must make a record of the exercise of the right and state expressly that he does not believe the claimant. Failure thus to make an entry that he disbelieved the registrant precludes the Government from arguing it here. *National Labor Relations Board* v. *Dinion Coil Co.,* 201 F. 2d 484, is therefore not in point.—See also *Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815.

A case directly in point is *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801. (Compare *White* v. *United* States, 9th Cir., Sept. 14, 1954, 215 F. 2d 782.) Schuman filed the conscientious objector form late. He became one of Jehovah's Witnesses after he filed his classification questionnaire. The facts are stated in the opinion in that case.—See 208 F. 2d, pp. 805-806.

The fact that the record showed that Gonzales was a late-comer to Jehovah's Witnesses did not in any way show that he was any less sincere in his acts and conduct than

one of Jehovah's Witnesses who had been born and reared in the faith or who was one of Jehovah's Witnesses when he registered. The record showed that Gonzales took a stand and course of action that proved genuinely his sincerity.

Why should one who has recently become one of Jehovah's Witnesses and who carries on in the same devout and sincere way as one who has been born and reared in the faith be treated differently? What is the basis for the discrimination? There is none. The absence of some positive evidence that shows the registrant is a faker or is feigning to be a conscientious objector for the sole purpose of evading the draft is then used as an argument that because he is a late-comer this *ipso facto* constitutes basis in fact for the denial of the conscientious objector status. The report and recommendation of the hearing officer and the final recommendation by the Assistant Attorney General were not findings of fact. They refer to no facts or evidence that disputed the testimony given by Gonzales. The conclusions of fact and law made by the hearing officer and the Assistant Attorney General were erroneous and contrary to fact and law. They do not constitute any facts. They may not be relied upon as basis in fact. This is especially true since no facts were referred to by the hearing officer or the Assistant Attorney General that in any way contradicted the testimony of Gonzales.

The rule of *Dickinson* v. *United States,* 346 U. S. 389, 396-397 (1953), applies here. This rule also rejects the conclusion of the hearing officer of the Department of Justice and the report of the Assistant Attorney General in the same way that it also rejects the final I-A classification by the appeal board. Neither of these officers is authorized to speculate and guess or draw inferences contrary to the undisputed evidence.—*Dickinson* v. *United States,* 346 U. S. 389 (1953); see also *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 805-806.

Since the hearing officer and the Assistant Attorney General cannot speculate, then their speculations are unauthorized and cannot be relied upon by this Court as basis in fact for the denial of the conscientious objector status. It should be remembered that registrants are authorized to change their status after the filing of their classification questionnaires. There was a change of the status of the registrant in *Dickinson* v. *United States,* 346 U. S. 389, 392-393, 395 (1953). This was held not to be any basis in fact for the denial of the classification. Section 1625.1(a) of the Selective Service Regulations provides that "no classification is permanent." Section 1625.2 provides for the reopening of the classification when there has been a change in the status of the registrant, following his classification. These regulations were interpreted by the court in *Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633, 635, to mean that a registrant must have his status determined according to the time of the final classification rather than his status at the time of his registration or at the time of his first classification. —See also *Brown* v. *United States,* 9th Cir., Oct. 4, 1954, — F. 2d — .

The scope of review in Selective Service cases as far as the classification is concerned is limited and restricted. (*Estep* v. *United States,* 327 U. S. 114, 121-122 (1946)) In cases where the review is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency. (*N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446) For the final order to be valid the local board must strictly comply with the procedural requirements.—*Ver Mehren* v. *Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; Ex parte *Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, 147-148; *United States* v. *Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis* v. *United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board

with a recommendation that it be followed. The appeal board followed the recommendation. While the recommendation was only advisory, the fact is that it was accepted and acted upon then by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer. It gave petitioner a I-A classification and denied his conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error.—*United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 131; *Goetz* v. *United States,* 9th Cir., Oct. 14, 1954, — F. 2d —; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d —; *Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d —.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board become a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano,* S. D. N. Y., 1952, 103 F. Supp. 597, 600-601) The illegal recommendation by the hearing officer and the Department of Justice to the appeal board produces a break in the link and makes the entire Selective Service chain useless, void and of no force and effect. In *Kessler* v. *Strecker,* 307 U. S. 22, 34 (1939), the Court held that if one of the elements is lacking the "proceeding is void and must be set aside." Acceptance of the recommendation of the Department of Justice that has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.—*Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d —; *Clementino* v. *United States,* 9th Cir., Sept. 27, 1954, — F. 2d —.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing

officer and the recommendation a vital link in the administrative chain is supported by *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d —; *United States* v. *Evergam,* D. W. Va., 1951, 102 F. Supp. 128, 130, 131; see also *Goetz* v. *United States,* 9th Cir., Oct. 14, 1954, — F. 2d —; *United States* v. *Bouziden,* W. D. Okla., 1952, 108 F. Supp. 395, 397-398; compare *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 330-331.

The report of the hearing officer and the recommendation of the hearing officer to find against petitioner on grounds outside the law are condemned by *Reel* v. *Badt,* 2d Cir., 1944, 141 F. 2d 845, 847. In that case the court said: "In other words he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S.* v. *Kauten,* 2 Cir., 133 F. 2d 703."—See also *Phillips* v. *Downer,* 2d Cir., 1943, 135 F. 2d 521, 525-526.

It is respectfully submitted, therefore, that the recommendation by the hearing officer and the Department of Justice to the appeal board is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report was based.

THREE

The Department of Justice deprived Gonzales of his procedural rights to due process of law by not mailing a copy of the report of the hearing officer and its proposed recommendation to the appeal board to petitioner before the recommendation was mailed to the appeal board, and by not giving him an opportunity to rebut the adverse recommendation before the final appeal board classification, contrary to due process of law.

In carrying out the conscientious objector procedure of Section 6(j) of the Universal Military Training and Service Act it has always been (and still is) the policy of the Department of Justice not to give an opportunity to the registrant to answer an unfavorable recommendation. It

sends its recommendation to the appeal board without notice to the conscientious objector. (Sections 1626.25 and 1626.26 of the regulations, *supra*, pp. 4-7) The appeal board acts on the recommendation without first notifying the registrant. It does not give him a chance to answer an unfavorable recommendation made by the Department of Justice. These acts of the Department of Justice and the appeal boards in not giving notice are not commanded by the regulations and violate the act and the due-process clause of the Fifth Amendment.

The act says that classifications must be fair and just. (Section 1(c), *supra*, p. 2) The Fifth Amendment guarantees due process of law. When the departmental recommendation is adverse and is acted upon by the appeal board to deny his claim for classification as a conscientious objector it is neither fair and just nor in accordance with due process.

It seems, therefore, that the procedure followed by the Department of Justice and the Selective Service System in all conscientious objector cases handled by the Department of Justice is invalid. The registrant should have the right to answer the unfair report and recommendation before the appeal board. Since he does not have notice he is not given a full and fair hearing before the appeal board. The recommendation is made available to the registrant after the appeal board has denied his conscientious objector claim, classified him and returned the file to the local board. After he has lost the appeal it is too late for the registrant to have notice or to see the adverse recommendation. He must have notice and see it in time to protect himself before the appeal board. Since the adverse recommendation is considered without notice to the registrant and is followed, there is a denial of due process in violation of the act and the Fifth Amendment.

The court below held that the procedural rights of petitioner were not violated when the appeal board considered and acted upon the adverse recommendation of the Depart-

ment of Justice. [R. 100] It was against the conscientious objector claim of petitioner. It was considered by the appeal board without giving him an opportunity to answer it before that appeal board made the final classification. This holding is out of harmony with the principle stated by United States Court of Appeals for the Fourth Circuit in *Brewer* v. *United States,* 1954, 211 F. 2d 864, 866. Compare *Sheats* v. *United States,* 10th Cir., 1954, 215 F. 2d 746. The court held that consideration by the appeal board of the secret FBI investigative report, inadvertently sent to the board by the Department of Justice, deprived him of due process of law. The court found that the registrant was denied the right to answer the FBI report before the appeal board. The court, however, said erroneously that a registrant was given the right by the regulations to see and answer the recommendation of the Department of Justice to the appeal board. Contrary to that statement are the regulations that do not grant the right. The holding by the court below on this point is also in direct conflict with *DeGraw* v. *Toon,* 2d Cir., 1945, 151 F. 2d 778, 779; and *United States* v. *Balogh,* 2d Cir., 1946, 157 F. 2d 939, 943-944, vacated, 329 U. S. 692 (1947) and affirmed, 2d Cir., 1947, 160 F. 2d 999.

The holding by the court below [R. 99] (that action on secret reports of a trial examiner or agency hearing officer without notice and an opportunity to reply before final decision is made by the administrative agency is not a violation of due process of law) conflicts directly with *Kwock Jan Fat* v. *White,* 253 U. S. 454, 459, 463, 464 (1920); *Morgan* v. *United States,* 304 U. S. 1, 22, 23 (1938); *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91-92, 93 (1913); *United States* v. *Abilene & S. Ry. Co.,* 265 U. S. 274, 290 (1924); *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 524 (1912).

In the case of *Morgan* v. *United States,* 304 U. S. 1, 19 (1938), the Court said: "Those who are brought into contest with the Government in a quasi-judicial proceeding

aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants." Identically the same secret proposal was made here by the Department of Justice, and the appeal board acted upon it in this case without the knowledge of the petitioner in time to protect himself. This star-chamber procedure prescribed by the regulations is a denial of due process of law. It conflicts with the "fair and just" provisions of Section 1(c) of the act and the Fifth Amendment to the United States Constitution.

It is submitted, therefore, that petitioner was denied procedural due process of law when he was tried behind his back in the appeal board and denied the right to rebut the adverse recommendation before the final I-A classification by the appeal board, contrary to due process of law.

CONCLUSION

This Court should hold that there was no basis in fact for the denial of the conscientious objector classification. It should be declared, therefore, that the final I-A classification by the appeal board was arbitrary and capricious. This Court should hold that the facts that Gonzales was a late-comer to Jehovah's Witnesses, that others of Jehovah's Witnesses went into the army and that each individual may determine whether or not he is a conscientious objector or to do defense work, all are no basis in fact for the denial of the conscientious objector status, in the face of the finding that Gonzales was sincere and in the lack of any affirmative evidence that he was not conscientious. It should also be held that the recommendation of the Department of Justice (that Gonzales be denied the conscientious objector status because of his late conversion as one of Jehovah's Witnesses) is illegal and no basis for the denial of the conscientious objector status on the record in this

case. It should also be declared that the petitioner was deprived of procedural due process of law when the Department of Justice and the appeal board failed to give him notice and an opportunity to rebut the adverse recommendation of the Department of Justice before the final I-A classification was made by the appeal board.

It is submitted, therefore, that the judgment of the courts below should be reversed and the cause remanded to the district court with directions that the motion for judgment of acquittal be sustained and the petitioner be discharged.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

November, 1954.